Pisa v. Blanks, No. 05-55625

REINHARDT, Circuit Judge, dissenting:

I dissent. This is an egregious case of ineffective assistance of counsel. The trial judge stated that counsel's opening argument gave him "the distinct impression that this attorney doesn't really have a clue about where he's going or what his theory is or what the defense is or what the case is all about. And I think the closing argument doesn't do much to dispel that initial impression, frankly."

Incredibly, defense counsel's shortcomings in the courtroom pale when compared to his absolute delinquency in preparing for his client's trial. Following his brief initial visit with Somdeth Pisa, which lasted no more than thirty minutes, he saw Pisa only during court appearances and failed to review any evidence, or discuss the case, with him. More important, he did not contact *any* witnesses to the events immediately giving rise to the charges against Pisa, including Khamphiang Daraphath, who was named as a witness in the police report. Daraphath submitted a sworn declaration in support of Pisa's new trial motion in which he stated unequivocally that the accuser did not suffer the injuries in the way she described, but rather likely as the result of falling while intoxicated and striking her face against a night stand. Daraphath avers that when he saw the "victim" just prior to her entering the bedroom, where she suffered the apparent fall, she did not have

any injuries to her face. Defense counsel also failed to contact Khonemala Didyvong, a percipient witness whose declaration corroborates Daraphath's account and contradicts the accuser's.

The California Court of Appeal rejected Pisa's ineffective assistance of counsel claim, holding that he did not show that he was prejudiced by counsel's failure to investigate his case because the declarants' sworn statements did not account for the injuries to the accuser's face. That conclusion is, without question, wholly without merit, and it constitutes an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). First, the witnesses' statements, if true, show that the injuries could not possibly have occurred as the prosecution argued. According to the two witnesses, the accuser did not have any injuries to her face when she entered the house from the front yard, where she had been, according to the prosecution, kicked in the face by Pisa. Thus, the witnesses' statements, if believed, establish that Pisa did not commit the offense with which he was charged, or at least did not commit the offense when and as the prosecution alleged. Second, the statements show that the accuser's injuries could in fact have been inflicted in the manner urged by the defense. On cross-examination, the state's medical expert, Dr. Geoffrey Smith, testified as follows:

Question: As you sit here today, and based on all your medical experience

> and surgeries, you're saying it's not possible that these injuries could have been caused by her falling down on to the ground?
>
> Dr. Smith: *Well if she fell on to an object it could be. If she fell on to a corner of a table, anything that would strike the eyeball specifically* and a level flat surface can't do that.

The majority somehow concludes that the state Court of Appeal's determination that the accuser *could not* have suffered her injuries as the result of a face-first fall against a night stand, when the prosecution's own expert testified that she in fact *could* have, is not unreasonable. In my view, it would not be possible to reach the state court's conclusion unless one had not read the trial record, in particular Dr. Smith's testimony. The state court decision simply ignores the testimony in the record and announces a result that is directly contrary to the undisputed medical evidence.

The state presented two witnesses at trial: the accuser and Dr. Smith. Defense counsel called one witness, who did not refute the accuser's account of how she sustained her facial injuries. Thus, the jury heard no witness testimony either corroborating or rebutting the accuser's story. Plainly, then, defense counsel's failure to contact at least two witnesses who would have directly contradicted the accuser's account, and whose testimony would have been consistent with Dr. Smith's, prejudiced Pisa. The sworn declarations by Daraphath

and Didyvong necessarily undermine one's confidence in the outcome. *See Strickland*, 466 U.S. at 694. For that reason, I would remand Pisa's petition for an evidentiary hearing.